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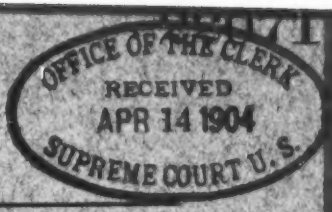

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 240.

THE DELAWARE INDIANS, RESIDING IN THE CHEROKEE NATION, ETC., APPELLANTS,

vs.

THE CHEROKEE NATION, RESPONDENT.

PETITION AND BRIEF FOR REHEARING.

Filed April 14, 1904.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Attorneys for Appellant.

GEORGE S. CHASE.
Of Counsel.

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The said appellants, the Delaware Indians, residing in the Cherokee Nation, respectfully petition the court for a rehearing and reargument of the above-entitled cause for the following reasons:

First. That the meaning of said decision may be made more definite and [illegible]in.

Second. Because [illegible]e parties in interest in said suit can not agree as to the purport and scope of said decision.

Third. For the reason that a difference of opinion has arisen in the Executive Departments as to the proper interpretation to be given to said decision.

Fourth. For the reason that the interpretation given to said decision by the respondent is widely different from that entertained by the appellants.

Fifth. In order that, if the interpretation given to said

decision by the appellants shall be found to be not in accord with the present views of the court, counsel may be heard upon the merits; all of which will more fully appear from the brief filed herewith.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Attorneys for Appellant.

GEORGE S. CHASE.
Of Counsel.

BRIEF.

On February 23, 1904, this court rendered its decision in this case, which has led to a very great contrariety of opinion as to its scope and purpose. After stating the case the court almost immediately takes up the consideration of the case of the Cherokee Nation against Journeycake, reported in 155 U. S. 196, being a case between the same parties, and in which many of the same questions were involved as in the present controversy, though there are some differences not involving the questions to which it is desired to particularly call the attention of the court.

In the present case the court quotes extensively from the Journeycake case, and states that the force of the pertinent language used by Mr. Justice Brewer in that decision "has not been diminished in the light of subsequent examination, aided by the arguments and briefs of counsel now presented."

We understand that at least a part of the officers of the Interior Department, members of the Commission to the Five Civilized Tribes and some of those in authority in the Cherokee Nation, hold the decision to mean that only those registered Delawares who are *now living*, or who were living on the 1st day of September, 1902, are to receive 160 acres each on account of the purchase made by the Delaware tribe in 1867, while all other Delawares, who are members and citizens of the Cherokee Nation are to receive allotments as if they were native Cherokees only; yet nowhere in this decision do we find the expression "registered Delawares *now living*," nor even the expression "*living* registered Delawares," although if such had been the intention of the court, it would seem to have been the most natural and easy thing to have used this expression, which would have relieved the case of any possible ambiguity. Nor is it possible to adopt the construction contended for if the Journeycake case is to be approved and followed, for such contention is wholly incom-

patible with the plain declarations of the decision in that case.

In the opinion of the court in the case at bar (p. 8), the expression in the Journeycake case is quoted with approbation as follows, the italics being ours:

> "And as further consideration for the payment of this sum for the purchase of homes, the Delawares were guaranteed *not merely* the continued *occupancy* thereof, but *also*, that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they would receive an *aggregate amount* equal to that which they *had* purchased, and such distribution as would secure to them the homes upon which they had settled, together with their improvements," etc.

And in the closing paragraph of the opinion (p. 11), the court say:

> "We think a decree should have been entered finding the registered Delawares entitled to participate equally with the Cherokee citizens of Cherokee blood in the allotment of lands of the Cherokee Nation, with the addition that if there is not enough land to give to each citizen of the Nation 160 acres, then the registered Delawares shall be given that quantity, together with their improvements. In all other respects, the Cherokee citizens, whether of Delaware or Cherokee blood, should be given equal rights in the lands and funds of the Cherokee Nation."

The report of the Dawes Commission for 1903 shows that there were 195 registered Delawares living on December 31, 1903. At the time of the commencement of this suit, as shown by the record, there were 212 living, and at the date the allotments in the Cherokee Nation take effect (September 1, 1903), it is understood there were 205 living. If the contention of the other side as to the meaning of the decision in the case, to wit, that only *living* registered Delawares are to receive 160 acres each, should be taken as correct, and

the date when the Cherokee allotments become effective be taken as the time the Delaware allotments take effect, then the registered Delawares would receive only 32,800 acres, and the unregistered Delawares, stated by the Dawes Commission to be 835, would be entitled to 110 acres of average land each, making 91,850 acres; but as the Delaware lands are above the average, the unregistered class would probably not receive to exceed 80 acres each, making 66,800 acres, making the total lands allotable to the Delawares 99,600. In other words, by the decision as interpreted by the other side, the Delawares would receive 58,000 acres less than they purchased in 1867. This would be in direct conflict with the statements of this court, above set forth—

> "That in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they (the registered Delawares) would receive an *aggregate amount equal to that which they had purchased.*"

The appellants have with microscopic care examined the opinion of this court in order to learn what basis, if any, there was for such an interpretation, and are fully confirmed in the opinion that the court intended by the term "registered Delawares" the registered Delawares so precisely described by the agreement of 1867 as "each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent and on file in the Office of Indian Affairs, etc.," who have always been known to the Department and to Congress and to the court as the "registered Delawares."

There is no ground in the language of the opinion for the interpretation that the court intended by the term "registered Delawares" only a portion of the registered Delawares, or only the registered Delawares now living, or only the registered Delawares living on September 1, 1902, the date fixed by the Cherokee Allotment Act for enrolling Cherokee citizens, or only the registered Delawares living

July 1, 1902, the date of the approval of the Cherokee Allotment act, or only the living registered Delawares who were alive when the suit of the Delawares was brought against the Cherokee Nation, or only the "registered Delawares" who might be alive when the Dawes Commission should hereafter consider the application for an allotment to the registered Delawares applying. The limitation of the term "registered Delawares" to living registered Delawares and the fixing of any one of the above suggested dates for the purpose of determining how many living registered Delawares might be included or contemplated by the decree of this court would be purely arbitrary and without any authority whatever, as nothing in the opinion or in the decree justifies any such limitation.

We understand that such interpretation is based upon the argument that the purchase of 1867 was only an occupant right, or a life estate. And the apparent idea that the occupant right being a life estate, the guarantee, upon the contingency of allotment, of the "aggregate amount of land equal to that which they had purchased" (for occupancy), must also be a life estate, a conclusion entirely unwarranted. Such interpretation ignores the fact that the registered Delawares bought "*not merely*" an occupant right or life estate, *but also* the right that, in the event of an allotment, they "should receive an *aggregate* amount *equal* to that which they had purchased."

At the making of the agreement of 1867 the Delawares, it is true, bought a life estate, consisting of an occupant right, which an individual could transfer from place to place at will, but at the same time in 1867 each registered Delaware then and there bought for his $160 contributed to the Cherokee treasury the further right of an allotment of 160 acres *whenever the contingency of allotment should arise.*

If the allotment had been made in the summer of 1867 evidently each registered Delaware would have received his allotment of 160 acres, which he had bought at that

time. The right of the allotment vested in him in 1867 at the time the agreement was made and the register definitely established.

This honorable court (pages 5 to 9) hold that the Delawares did not acquire an estate in fee by the purchase of 1867, and suggest a number of reasons why the contention of the Delawares, that they had acquired "an estate in fee" by the purchase in 1867, was not well founded, as follows:

1. The agreement to sell to the Delawares 157,600 acres was conditioned that the land sold was "for their occupancy," which "does not import a holding beyond the life of the first taker, and is entirely inconsistent with the idea of permancy of tenure in the estate conveyed unless, etc."

2. That the lands sold remained "Cherokee lands," "subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof; provided, that nothing herein shall confer the right to alienate, convey, or dispose of any such land except in accordance with the constitution and laws of said Cherokee Nation."

3. That the absence in the agreement between the Delawares and Cherokees of any provision as to the transfer of such occupant lands by inheritance, shows that it was not intended to grant a fee to these lands in 1867, at the time of making this agreement.

4. That the very fact that it was proposed in the agreement with the registered Delawares that—

> "in case the Cherokee lands shall hereafter be allotted among the members of said nation, the aggregate amount of land provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say one hundred and sixty acres for each individual) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation"

demonstrates that it was not intended to pass the fee in 1867.

5. It is perfectly clear that if the occupant right bought in 1867 had been the equivalent of a fee to the land there would have been no occasion to guarantee 160 acres to each registered Delaware incorporated by the agreement of 1867 into the Cherokee Nation in case of allotment, or to guarantee them the aggregate. It was because the occupant right was not a good title that this guarantee in case of allotment was made.

In giving these reasons showing that the Delawares did not acquire a fee to the lands sold them for their occupancy in 1867 the court point out with great clearness that these considerations are addressed exclusively to the claim of the Delawares, that they had acquired an "estate in fee" to these lands in 1867 (Rec. p. 5) and say (Rec. p. 6) "We are here dealing with the *extent* of the title conveyed."

These reasons are all directed to the proposition that the Delawares did not acquire an "estate in fee" by the purchase of 1867, but only bought the occupant right subject to the laws of the Cherokee Nation regulating the settlement and occupancy of the Cherokee public domain by its citizens.

When the court comes to consider the other proposition, to wit, the guarantee of 160 acres to each Delaware incorporated by the articles (1867) into the Cherokee Nation *upon the contingency of an allotment*, there is nowhere any suggestion whatever that this right to an allotment constituted a life estate.

By its very nature it could not be a life estate. It was a vested right based on the contingency of a general allotment as then contemplated and conditionally provided for by the Cherokee treaty of 1866. The right once vested in the grantee must go to him or to his estate whenever the contingency of allotment occurs.

Congress, anticipating the death of persons entitled to allotment under the various Indian agreements in Indian

Territory, has long since put in force suitable laws governing inheritance of such allotment rights.

The registered Delawares bought the right to an allotment upon a contingency which might not occur for many years, which did not occur for thirty-five years. If it had occurred at once, every registered Delaware would have gotten his allotment of 160 acres.

By what reasoning can the Cherokee Nation plead that the right of a registered Delaware to an allotment of 160 acres, upon the contingency of allotment ceases to exist before the contingency has arisen?

The Delaware-Cherokee contract nowhere expresses the idea that the right of 985 registered Delawares to an allotment of 160 acres each and the guarantee to them of an aggregate amount of land equivalent to the land they had purchased (157,600) should be diminished by the death of a registered Delaware. The guarantee of an aggregate is an express and direct contradiction to such interpretation.

The registered Delaware under his occupant right was at liberty to transfer this occupant right from one place to another as often as he pleased up to the point when allotment was made. Then, whether he had exercised his occupant right or not, he was entitled to have allotted to him 160 acres of land subject to whatever rules might be laid down by competent authority for the making of such allotment. When the land was allotted the right of the Cherokee Nation to control such portion of the public domain necessarily ceased. Until such land was allotted it remained the land of the Cherokee Nation, subject to the rules controlling the Cherokee public domain. The reason why the Cherokee Nation limited the sale of 157,600 acres in 1867 to an occupant right, without the privilege of alienation and kept such lands subject to the Cherokee law, was for the reason that any other than this limited grant would have honeycombed the Cherokee domain by Delaware transfers with alien landholders over whom the Cherokee author-

ities could have exercised no control. This was the very thing which disintegrated the lands the Cherokees formerly held east of the Mississippi River and which led to their forced removal from that country.

Whenever allotment was agreed upon, however, this policy ceased. The Cherokee policy of communal land holding being abandoned by allotment, the land might become alienable or inheritable without being obnoxious to national policy.

The registered Delawares paid $157,600 for the occupant right to 157,600 acres, which could be transferred from one place to another, and which was in fact a constantly variable part of the public domain, and which occupant right was necessarily a mere life estate; but for the $157,600 the registered Delawares acquired *another right*, in case of allotment, to 157,600 acres to be definitely ascertained and determined upon that contingency, according to legal subdivisions, when surveys should be made, and, upon this contingency, the aggregate amount of land was guaranteed to them, and to every one of them, to wit, 160 acres to include their improvements, if any they had, "to each registered Delaware incorporated by these articles into the Cherokee Nation."

The registered Delawares bought "*not merely*" an occupant right to 160 acres each, which was a life estate, *but also* each of 985 registered Delawares bought then and there the right to an allotment of 160 acres upon the contingency of an allotment of the Cherokee domain. Each registered Delaware then and there paid $160 for the right to have allotted to him 160 acres whenever allotment took place. The contingent right to this allotment was vested in such registered Delaware at the moment the contract was concluded, the grant being *in presenti*. We think the court set this forth (Rec. p. 8) with perfect clearness, as follows:

> "In the Journeycake case, while it is true that the precise question was not the same as is now presented,

full consideration to all the terms of this contract was given in order to determine the interests of the Delawares in the Cherokee lands sold, and the court, speaking by Mr. Justice Brewer, used this pertinent language, the force of which has not been diminished in the light of subsequent examination aided by the arguments and briefs of counsel now presented.

"So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees in their long occupation of this reservation had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee reservation. And as a further consideration for the payment of this sum for the purchase of homes, *the Delawares were guaranteed not merely* the continued occupancy thereof, *but also* that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, *they should receive an aggregate amount equal to that which they had purchased*, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. So that if, when the allotments were made, there was for any reason not land enough to secure to each member of the Cherokees 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees pro rata."

If "they should receive an aggregate amount equal to that which they had purchased" they would receive 157,600 acres, or 160 acres in allotment for each registered Delaware.

If the contention of the Cherokee Nation were true that only "the living" registered Delawares were entitled to an

allotment, then the registered Delawares, 205 persons, living September 1, 1903, the date of the Cherokee Allotment Act, would receive only 32,800 acres instead of 157,600 acres, the aggregate guaranteed the registered Delawares. The registered Delawares, in addition to the $157,600 paid the Cherokees for the contingent right of allotment of 160 acres each, also paid $121,824.28 that their children might have the same right of allotment with other Cherokee citizens.

The Cherokee interpretation is in direct conflict with the opinion of this court as above quoted, to wit:

> "That in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they (the registered Delawares) should receive an aggregate amount equal to that which they had purchased" (157,600 acres).

We respectfully call attention to the use of the term "*equal to.*" It is not necessarily the same land they purchased for occupancy. It is an aggregate amount "*equal to*" such land in quantity, but which must be determined in its description by the incident of selection by the surveys and by the law controlling the allotment.

The Cherokee interpretation of the decision of this honorable court is understood to involve the proposition that an allotment can not be made to a registered Delaware unless he was living September 1, 1902; that it can not be made to a registered Delaware who died prior to that day, the date of the Cherokee allotment act.

Such a construction is not sustained by the principle of the allotment acts in force in any of the Five Civilized Tribes, nor is such rule in accord with the principle controlling the policy of the United States Government in dealing with the public domain.

There is a familiar saying that it is a poor rule that does not work both ways. If the dead Registered Delawares are not to be counted in determining the "aggregate amount"

of land to be allotted, then why were they counted when determining the "aggregate amount" of money to be paid? If the aggregate amount of land and aggregate amount of money did not become *fixed* when the roll was completed and approved, then why were two hundred dead registered Delawares counted in computing the amount of funds to be transferred to the Cherokees? In other words, if the roll, when complete, did not *fix* the aggregate number of acres, how did it come that it *did* fix the aggregate number of Delawares who were to be paid for at the rate of $160 each, dead or alive?

The decision, as interpreted by us, is in full harmony with the immemorial policy of the Government in disposing of the public domain, and of the rule now in full operation in allotting to the members of the Five Civilized Tribes.

In conveying title to the public lands, the method has always been to issue the patent in the name of the one who made settlement and proof, and became *entitled* to it, no matter how long he may have been dead at the time of the actual issuance of the patent. There are thousands of cases where patents have been issued to persons who have been dead ten, fifteen, or twenty years, and thousands more that have not been issued at all, but will be, at some future day, when some party in interest asks to have it done; and when issued they will run in the names of the entrymen who became entitled to them, no matter how long ago, no matter whether living or dead, and no matter how many times the property may have been transferred by sale, devise, inheritance, or other mesne process.

So in allotting lands to the members of the Five Civilized Tribes.

All Seminole Indians, whose names appear upon a certain roll and who were living December 31, 1899 (31 Stats. p. 250), are entitled to allotment of lands in the Seminole Nation, whether living or dead.

All Creek Indians whose names appear upon a certain

roll and who were living May 25, 1901, are entitled to allotment in the Creek Nation (see Public 200, approved June 30, 1902).

All Choctaw and Chickasaw citizens whose names appear upon a certain roll and who were living on July 1, 1902, are entitled to allotment in the *Choctaw and Chickasaw* Nation, whether living or dead (see Public 228, approved July 1, 1902).

All Cherokee citizens whose names appear upon a certain roll and who were living September 1, 1902, are entitled to allotment in the Cherokee Nation, whether living or dead (see Public 241, approved July 1, 1902).

Assuredly, then, the registered Delawares guaranteed 160 acres each in 1867 upon the contingency of an allotment of the Cherokee country are likewise entitled, living or dead, to the allotment then guaranteed. Indeed, to make assurance doubly sure, the aggregate amount was guaranteed so that not one of the 985 designated persons could fail to have the 160 acres duly allotted, living or dead, without breach of the contract. Each contributed $160 and each was guaranteed 160 acres in allotment.

The principle laid down in all of these agreements is, that when the right of allotment is vested by an agreement or contract, then the vested right is not lost by the death of the individual. The right to an allotment was vested in the registered Delawares in 1867, not on September 1, 1902, or any other convenient date.

This honorable court has said that the registered Delawares bought something more than an occupant right when they paid the sum of $157,600, as follows (p. 8):

> "And as a further consideration for the payment of this sum for the purchase of homes the Delawares were guaranteed *not merely* the continued occupancy thereof, *but also* that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, *they should re-*

> *ceive an aggregate amount equal to that which they had purchased*, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements."

The Cherokee-Delaware agreement of 1867 likewise says:

> "And in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that *the aggregate amount of land herein provided for the Delawares*, to include their improvements according to the legal subdivisions when surveys are made (that is to say, *one hundred and sixty acres for each individual*), shall be *guaranteed to each Delaware* incorporated by these articles into the Cherokee Nation."

The 160 acres guaranteed to each individual incorporated into the Cherokee Nation on the register of 1867 is not conditioned on such individual being alive on September 1, 1902.

The allotment right of 160 acres was vested in each registered Delaware in 1867 and not vested in him on September 1, 1902, and once vested in him it can not be taken from him without his consent.

If the registered Delawares were guaranteed *not merely* the occupant right, but also that they should receive upon allotment "an aggregate amount equal to that which they had purchased" (157,600 acres), how can the contention be set up that this aggregate should be diminished quarter-section by quarter-section as each registered Delaware died, until no right of allotment was left?

The apparent hiatus that would exist after the termination of the life estate in the case of a deceased Delaware before the additional right to an allotment should arise, presents no difficulty whatever, for the reason that his right to a life estate, as already discussed, does not attach to any particular piece of land, unless he may have desired to have it so, for the communal right of occupancy of all the Chero-

kees could be exercised in any part of the national domain and changed at will, and become fixed to a specific tract only in the contingency of an allotment. It is exactly similar to the case of a grant of land to a railroad which this court has held in a long line of decisions to be *in presenti*, but the grant has been declared to be a "float" until the happening of a contingency, i. e., the filing of a map of definite location, when the grant becomes fixed upon specific land. In the case of the Delaware purchase the life estate was in the nature of a float and could be enjoyed anywhere, until the happening of the contingency of allotment, at which time it ceased to exist and in its place arose the right to an allotment of 160 acres of specific land.

Who are the "registered Delawares?" Of whom does this class consist? The registered Delawares were those members of the Delaware tribe whose names were entered upon a certain register made by John G. Pratt, agent of said Indians, in February, 1867, and those whose names were added thereto within 30 days from the signing of the agreement of April 8, 1867. At the expiration of said 30 days, to wit, on May 8, 1867, the "Delaware register" became a *fixed thing*, and the Indians whose names appear thereon became then and for all time the "registered Delawares."

As appears from the official register on file in the Indian Office, and which is referred to in the record and by stipulation made a part of it, and is presented to the court for its inspection, twelve of the Delawares whose names were placed thereon were dead *before said roll was completed*, on May 8, 1867, and yet $160 was paid for each of them. Why? Simply because their names went to make up the *aggregate* number, for whom an "aggregate amount of land" was being purchased, and once on the roll they remained there, the aggregate amount of money and the aggregate amount of land being fixed and determined by the roll, which was 985 times 160. As shown by the record, before the funds were transferred or the land taken possession of, more than

two hundred had died, but their shares were paid for in the same manner and for the same reason.

This is in direct line with the thought and expressions of the agreement of 1867, which contains this pertinent language:

> "That the aggregate amount of land herein provided for the Delawares, to include their improvements, according to the legal subdivisions when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation."

This guarantee of 160 acres to *each Delaware* whose name was entered by Agent Pratt upon his register which was completed on May 8, 1867, was an entirely different thing from the occupant right referred to by the court, and was evidently the right which the court in this case and in the Journeycake case had in mind when they declared that *besides* the right of equal participation with Cherokees, there was guaranteed to them, whenever allotments should be made—

> "the *addition* that if there is not enough land to give to each citizen of the nation 160 acres, then the registered Delawares shall be given that quantity together with their improvements."

This guarantee of 160 acres to each registered Delaware was expressly a contingency which was to happen in the indefinite future, the language in the Journeycake case being:

> "So that if, *when* the allotment was made there was for any reason not land enough to secure to each member of the Cherokees 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees pro rata."

"*When* the allotment was made," is the same as to say "*whenever* the allotment was made," etc., which contingency

might occur in one year, in five years, in fifty years, or when every Delaware upon this register had died. It was in fact delayed thirty years, and delayed by the Cherokee Nation. The contingency of allotment was evidently not expected to happen immediately, and if it was to be delayed at all, *surely the length of the* delay could in no way affect the principle involved.

The court distinctly sets forth that the very stipulation to secure to the Delawares, in the contingency of an allotment, *the aggregate amount* of land provided for the registered Delawares was entirely superfluous if the right of occupancy conveyed to the Delawares prior to allotment had been a fee or the equivalent to a fee. This proposition is wholly satisfactory to us, and is in entire harmony with the interpretation of this decision which we entertain, that is to say, that under the agreement of 1867 there was secured to each Delaware whose name was entered upon the Delaware register, 160 acres of land for life, "with the addition" that when (whenever) an allotment should take place there should be allotted to each Indian whose name appeared upon said register 160 acres of land, being "the aggregate amount *equal to* that which they had purchased," and being 985 times 160 acres, or 157,600 acres "in the aggregate."

Had the lands of the Cherokee Nation been surveyed at once, after said agreement was entered into, as was promised, and as was provided in the treaties of July 4 and August 11, 1866, and been then allotted, there would have been no question of the right of the Delawares to the full measure of the land paid for. Is their estate, then, to become a disappearing quantity, growing less and less, day by day, as their numbers decrease, and finally disappearing, by no fault of their own, but by reason of the laches of the Government and of the Cherokee Nation, which, by preventing and defeating allotments in severalty, is permitted to enjoy great profit from its own neglect? During all

this time the Delawares have been ever ready and insistent that allotments should be taken in severalty, but their requests and petitions have been disregarded.

The Journeycake decision further states that in giving the Delawares the "aggregate amount" of land purchased, such a distribution "would secure to them the homes upon which they *had settled*, together with their improvements." Unless the interpretation here contended for be the true one, this result could never be accomplished.

After their removal and settlement in the Cherokee Nation in 1868, and the payment for their lands and rights in said Nation, the Delawares still possessed a large fund in the hands of the Government, amounting to about $1,000,000, upon which they were receiving interest at the rate of 5 per cent. per annum, yielding them a permanent and regular income. They were urged by the Cherokees and others to request that this fund be paid to them per capita, and many reasons were urged upon them to induce them to take steps to have this fund so disbursed. Finally yielding to this pressure, they requested Congress to enact the necessary legislation. It was urged by the Cherokees that the money could be profitably spent by the Delawares in improving their farms.

On March 18, 1890, the Cherokee delegation, then in Washington, Messrs. Adair and Bushyhead, together with the principal chief of the nation, J. B. Mayes, presented to the Committees on Indian Affairs of Congress a memorial urging legislation for the disbursement of this fund to the Delawares, in which, among other things, as reasons why this action should be taken, they say:

> "Favorable opportunities for investment are everywhere present. The rapid improvement of our country makes it plainly apparent that all choice bodies of land will soon be occupied, and those of our citizens are fortunate who have the means to locate and improve these lands before they are all taken up," etc.

A perusal of this memorial will show the ingenious arguments resorted to by the Cherokee delegation to secure the passage of this legislation and the expenditure of this large amount of money in the Cherokee Nation.

Yielding to this persuasion, Congress, on March 3, 1891, appropriated one-half of the money and provided for its payment under the direction of the Secretary of the Interior. Before making the payment, however, Mr. Leo E. Bennett, at that time agent for the Five Civilized Tribes, made a thorough investigation as to the condition of the Delawares and the purposes to which the money was to be applied, submitting a list of questions to each Delaware and receiving his answers thereto, it appearing to be the purpose of the Department that this fund should be expended by the Delawares *only in the improvement of their farms and homes.* After making this investigation Mr. Bennett made a report, in which he says:

> "Besides the questions here printed, the question, 'To what use do you propose applying your principal funds if paid to you?' was asked each head of family. The answers were, almost without exception, 'Improve my place.' . . . Their houses are for the most part well built and substantial, and their fences, outhouses, and other improvements are well taken care of. No one who has visited the Delaware settlement could fail to note the fact that they are among the most thrifty and intelligent Indians in the entire Indian country."

Although this showing would seem to have been all that could have been expected or desired on the part of the Delawares, the Government seems to have decided that only one-half of the fund should be paid to them at that time, the other half being reserved until it could be seen that the first half had been applied to the improvements as contemplated, and the second half was not paid until 1893, when apparently the Department had become satisfied that all the first half had been strictly applied to the improve-

ment of the lands they had purchased under the agreement of April, 1867. In addition, nearly all of their portion of the proceeds of the sale of the outlet lands, which they received under this court's decision in the Journeycake case, amounting to $300,000, was also expended in the improvement of these lands. Thus it has resulted that by direction and cooperation of the Government, through its Department of the Interior, the Delaware lands, consisting of the aggregate amount of 157,600 acres "purchased" in 1867, and other parts of the Cherokee domain upon which the descendants of the original registered Delawares have from time to time settled, have been very highly improved and cultivated—more so than any other portion of the Cherokee Nation.

Are these the improvements to which the court in the Journeycake case had reference when it conveyed to the Delawares the hopeful and cheering message that there should be secured to them "the homes upon which they had settled, together with their improvements?" Unless the interpretation which we are now suggesting and which we believe to be the true and just one, is correct, then this message, instead of being one of hope and cheer, would become one of sorrow and consternation, for it would mean the confiscation, by strangers, of by far the larger portion of all these improvements and homes which the thrift, industry, and perseverance of the Delawares, in addition to the large expenditure of money so directed and compelled by the United States, have created.

A glance at the Delaware-Cherokee agreement will show that two of the Delawares who signed it, one being the principal chief, were illiterate, and signed by mark, while as a matter of fact the Cherokees were highly educated college men, the disparity in education and knowledge being extreme and apparent. Neither of the parties was sui juris, and both were wards of the Government. They had been brought to Washington to enter into a contract, to all

intents and purposes strictly in conformity with the provisions of the Delaware and Cherokee treaties with the United States of 1866, the only difference being that the Government not having itself become the purchaser of lands in the Cherokee Nation, as it had been in the Seminole, Creek, Choctaw and Chickasaw nations, in order to accomplish identically the same results, in every particular, instead of purchasing from the Cherokees and then conveying to the Delawares, brought the contracting parties before it, at the seat of government, and there directed their hands in the making of a contract in conformity with the policy and purpose of the Government as expressed in the treaties of 1866. It is true that the *nominal* parties to the contract were both Indian tribes, and in that sense not within the rule laid down by Chief Justice Marshall in Worcester *vs.* Georgia, but that rule should be read in its broad spirit, too; and it should not be forgotten that the agreement of 1867 was made in Washington, between *representatives* of the two contracting tribes, one delegation being learned and one ignorant, and the United States, prompting and guiding the negotiation in order to carry out its treaties of 1866, was in no wise relieved of its full responsibity to the unlettered Delawares who were at the seat of Government doing its bidding.

It would indeed be monstrous if by this method of varying the strict terms of the treaty made with the Delawares on July 4, and without any fault or co-operation on their part, but simply in the performance of the will and direction of the United States, these people in their ignorance, simplicity, and good faith, by the mere gymnastics of phraseology, with the meaning of which they were entirely unfamiliar, are to be figured out of their birthright and stripped of the small vestige remaining of the splendid empire that once was theirs, and of which, by successive treaties, invariably obtained, to say the least, by misunderstanding, has dwindled to the diminutive patch of earth

purchased in the Cherokee Nation, and which they are now making a last determined struggle to protect.

The Cherokee agreement (sec. 25) provides that the roll of citizens of the Cherokee Nation shall be made as of September 1, 1902, *and the names of all persons then living* and entitled to enrollment on that date shall be placed on the said roll by the commission to the Five Civilized Tribes; that no person whose name does not appear upon the roll prepared, as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act (sec. 31). That—

> "All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe as their right may be determined by the judgment of the Court of Claims, or by the Supreme Court, if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation and now pending." . . . "Said commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April 8, 1867, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees" (sec. 23, Cherokee Allotment Act, approved July 1, 1902).

Surely it will not be contended that this act intended or proposed to limit the right vested in the registered Delawares by the agreement of 1867.

Whenever allotment took place the right of a registered Delaware to 160 acres in allotment and the right of the

registered Delawares, 985 in number, to the "aggregate amount of land equal to that which they had purchased" (157,600 acres), can no longer be denied. Each individual is entitled to an allotment certificate, and the Cherokee Nation can not, as one of the parties to the contract of 1867, retain the consideration paid by the registered Delawares, and refuse to deliver to the registered Delawares "an aggregate amount equal to that which they had purchased."

It is evident that but one quality of title was conveyed to the registered Delawares under the agreement of 1867. If, therefore, it was a life estate only to the registered Delawares who have died, it would be a life estate only to the registered Delawares who are living, and it would follow, necessarily, upon the deaths of the two hundred registered Delawares now living that their estate in the land would terminate. This can not be true, for there is no provision for reversion in the agreement of 1867, or anywhere else, and the very fact of allotment in severalty, which, by operation of law, dissolves the Cherokee Nation and makes it simply a co-ordinate part of the Federal Government, shows conclusively that an estate terminable with the life of the individual was not contemplated by the agreement of 1867.

Obviously the guarantee made the registered Delawares of an aggregate of 157,600 acres will not be complied with, or the obligation discharged, if only 32,800 acres are allotted to living registered Delawares. The only way to discharge this obligation is by allotting the 985 registered Delawares on the Delaware register of 1867 one hundred and sixty acres each.

The language of this court in directing the decree providing the "registered Delawares" should receive an allotment of 160 acres each is, in the opinion of the appellants, absolutely clear and unequivocal. There would be no reason to change the language except for the contention being set up that the term "registered Delawares" be interpreted so as to

limit the "registered Delawares" to those who were alive at some date to be fixed by those who would so construe the language of the court. To make such controversy impossible and in order to be at peace the Delawares wish that the language be made so explicit that neither party may any longer be in doubt with regard thereto.

We pray, therefore, that the language of the court in directing the decree be amended so as to insert after the words "registered Delawares" the words "whose names are enrolled upon the register of 1867," and after the word "improvements," the words, that is to say, "That 157,600 acres shall be allotted to said registered Delawares, whether living or dead, in separate allotments, to include their improvements, in the names of and to each of them, whose names appear upon said register of 1867, each to receive 160 acres, and that patents should issue accordingly; and that," so as to read:

> "Instead of dismissing the bill we think a decree should have been entered, finding the registered Delawares entitled to participate equally with Cherkee citizens of Cherokee blood in the allotment of lands of the Cherokee Nation, with the addition, that if there is not enough land to give to each citizen of the nation 160 acres, then the registered Delawares whose names are enrolled upon the register of 1867 shall be given that quantity, together with their improvements, that is to say, that 157,600 acres shall be allotted to said registered Delawares, whether living or dead, in separate allotments, to include their improvements, in the names of and to each of them, whose names appear upon said register of 1867, each to receive 160 acres, and that patents should issue accordingly; and that in all other respects the Cherokee citizens, whether of Delaware or Cherokee blood, should be given equal rights in the lands and funds of the Cherokee Nation. The decree dismissing the bill is so modified as to conform to the terms just stated, and as so modified it is affirmed."

The Delawares, in humbly submitting to the views of this honorable court, respectfully pray that it be remembered that they have placed upon these lands, at the instance and under the directing hand of the United States, more than a million of dollars of improvements in confident reliance that, upon the contingency of allotment, the guarantee of the aggregate amount of 157,600 acres to the registered Delawares would afford them protection.

Respectfully submitted.

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